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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
|--|-------------|----------------------|---------------------|------------------|
| 09/922,520 | 08/03/2001 | Donald Pham | 111753 | 8849 |
| 76863 7590 11/20/2009 Kraguljac & Kalnay 4700 ROCKSIDE ROAD SUMMIT ONE, SUITE 510 INDEPENDENCE, OH 44131 | | | | |
| EXAMINER | | | | |
| DUONG, DUC T | | | | |
| ART UNIT | | PAPER NUMBER | | |
| 2467 | | | | |
| NOTIFICATION DATE | | DELIVERY MODE | | |
| 11/20/2009 | | ELECTRONIC | | |

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

mary@kkpatent.com
ptomail@kkpatent.com

Office Action Summary

Application No.

09/922,520

Applicant(s)

PHAM ET AL.

Examiner

Duc T. Duong

Art Unit

2467

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 17 July 2009.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1, 5-7, 13, 19 and 25-30 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☒ Claim(s) 1, 5, 6, 13, 19, 29 and 30 is/are allowed.
- 6) ☒ Claim(s) 7 is/are rejected.
- 7) ☒ Claim(s) 25-28 is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement (IDS) (PTO/ISA-92)
- 4) ☐ Interview Summary (PTO-413)
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____
- Page No(s)/Mail Date _____

DETAILED ACTION

Response to Arguments

1. Applicant's arguments, see pages 6-10, filed July 17, 2009, with respect to claims 1, 5-7, 13, 19, and 25-30 have been fully considered and are persuasive. The rejections of the claims have been withdrawn.

Claim Objections

2. Claims 25-28 are objected to because of the following informalities: These claims are objected to since they depend on a canceled claim (claims 20 and 21). Appropriate correction is required.

Claim Rejections - 35 USC § 101

3. 35 U.S.C. 101 reads as follows:

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

4. Claim 7 is rejected under 35 U.S.C. 101 because the claimed invention is directed to non-statutory subject matter.

Regarding to claim 7, the claim recited for "a program storage device readable by a machine..." and such program storage device is not clearly and explicitly stated in the specification and the claim to exclude transitory storage device such as electromagnetic signal or carrier wave. And claims that recite nothing but the physical characteristics of a form of energy, such as a frequency, voltage, or the strength of a magnetic field, define energy or magnetism, per se, and as such are nonstatutory natural phenomena. O'Reilly, 56 U.S. (15 How.) at 112-14.

Allowable Subject Matter

5. Claims 1, 5, 6, 13, 19, 29, and 30 are allowed.

The following is a statement of reasons for the indication of allowable subject matter: The prior art of record fails to teach or make obvious the steps of or means for **“a peak performance rate as the highest rate at which packets can be sent from the packet generator to the packet count unit with no packet dropout”**, when such rate is considered within the specific structure of the method recited in claim 1 or of the device recited in claim 13. The prior art of record fails to teach or make obvious the steps of or means for **“a peak performance rate of said network under test is established as the maximum receive rate at a particular packet size with no packet dropout”**, when such rate is considered within the specific structure of the device recited in claim 19.

Conclusion

6. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Duc T. Duong whose telephone number is (571)272-3122. The examiner can normally be reached on M-F (9:00 AM-6:00 PM).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Pankaj Kumar can be reached on 571-272-3011. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/D. T. D./
Examiner, Art Unit 2467

/Pankaj Kumar/
Supervisory Patent Examiner, Art Unit 2467